Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

D.

v.

Energy Charter Conference

134th Session **Judgment No. 4496**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. D. against the Energy Charter Conference (ECC) on 10 September 2018 and corrected on 3 October 2018, the ECC's reply of 9 January 2019, the complainant's rejoinder of 20 February and the ECC's surrejoinder of 5 April 2019;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant alleges that he suffered moral harassment, in particular when his end-of-service certificate was drawn up.

The complainant worked for the Energy Charter Secretariat – the secretariat of the Energy Charter Conference – from 13 September 2010 to 12 September 2016. On 6 February 2017 he wrote to the Secretary-General of the ECC asking him, inter alia, to sign a "draft letter of recommendation". On 23 July 2017 he requested a "work experience certificate" and drew his former employer's attention to the need to act quickly as his new appointment – which was conditional on his obtaining a work visa from the Chinese immigration authorities – was to start at the beginning of September.

On 3 August 2017 he received an end-of-service certificate dated the previous day and listing the various roles he had performed within the ECC during his six years of service. According to the complainant, the certificate did not meet the requirements of the Chinese immigration authorities, which prevented him from taking up his appointment in September and was, in his view, emblematic of the Secretary-General's desire to exercise control over his future employment. Also according to the complainant, the loss of a prospective job caused him to become depressed. On 4 August he saw a doctor, who found him to be in a "significant state of psychological distress [possibly resulting] [...] from the harassment he allege[d] to have suffered from his former employer".

The complainant informed the Secretary-General of the ECC on 14 August 2017 that he considered he was facing harassment, and he requested a new "mutually agreeable work experience certificate", failing which he would file an internal complaint with the Advisory Board. On 18 August the Secretary-General sent him an email refuting the existence of such harassment. However, he instructed the Assistant Secretary-General to produce an additional certificate, which she did on 22 August 2017.

The complainant consulted doctors on several occasions between October 2017 and January 2018. When he attempted to use the new end-of-service certificate, the Chinese authorities informed him that it did not bear an official stamp and was therefore invalid. He informed the Assistant Secretary-General of this problem on 30 January 2018 and asked her to incorporate some additional information into the certificate. She replied that she would try to revise the certificate but that final approval was needed from the Secretary-General. On 2 February the complainant received a version of the end-of-service certificate bearing the stamp of the ECC. On seeing that the content was the same as that of the version of 22 August 2017, he wrote to the Secretary-General on 12 February asking whether the document reflected his position. He again requested that additional information be incorporated into the certificate, which his former employer refused to do in an email of 22 February 2018.

On 3 April 2018 the complainant lodged an internal harassment complaint with the Advisory Board, in which he requested it to recognise that he was subjected to harassment by the Secretary-General, to put an end to that harassment by establishing an end-of-service certificate that faithfully reflected his activities within the ECC and to compensate him for the injury he considered he had suffered.

The Advisory Board heard the parties in May 2018. On 8 June it delivered its report, in which it recommended that the internal harassment complaint be dismissed as unfounded. This report was communicated to the complainant as a final decision in a letter from the Secretary-General dated 11 June 2018, which constitutes the impugned decision.

The complainant asks the Tribunal to set aside that decision, to order compensation for the material and moral injury he considers he has suffered and to award him costs.

The ECC submits that the complaint should be dismissed in its entirety. It points out that the complainant waited until August 2017 to report the existence of alleged harassment. This, it says, reflects a deliberate attempt on his part to broaden the subject matter of the dispute, which solely concerned the content of the end-of-service certificate.

CONSIDERATIONS

1. The complainant seeks the setting aside of the decision of 11 June 2018 of the Secretary-General of the ECC notifying him of the opinion of the Advisory Board of 8 June 2018, which found that there were no grounds for recognising the alleged harassment, that his request for an end to be put to such harassment was therefore irrelevant and that he therefore was not entitled to compensation for the injury he alleged to have suffered.

The internal harassment complaint on which the Advisory Board gave its opinion and which was the subject of the impugned decision is dated 29 March 2018 in its French version and 7 April 2018 in its English translation. In the internal complaint, the complainant asks the

Advisory Board to recognise the harassment he has suffered "as a result of the Secretary-General's actions", to put an immediate end to this harassment "through the establishment of an end-of-service certificate which faithfully reflects the activities [he has] exercised within the Charter and which is signed by the Secretary-General in person", and to grant him compensation him for the injury he alleges he has suffered in the amount of 285,716.75 euros, which includes 30,000 euros for moral injury and damage to his health. In the statement of "harassment facts" listed in the internal complaint, the complainant provides details of 85 facts which he divides into four groups:

(a) Content of the end-of-service certificate;

(b) Process to obtain the end-of-service certificate;

(c) Eviction from the NAPSI (Northeast Asia Power System Interconnection) project; and

(d) Earlier harassment facts.

The Tribunal observes that the internal harassment complaint was lodged by the complainant on 3 April 2018, although his service with the Energy Charter Secretariat had ended on 12 September 2016, more than 18 months earlier. In these circumstances, the Tribunal considers that the facts that led to the lodging of the internal complaint must be placed in context if the issues raised by the complaint before the Tribunal are to be properly understood.

2. In the first place, the Tribunal notes that on 6 February 2017, in an exchange of emails between the complainant and the Secretary-General on another subject, and in response to the request to submit the handover report which all staff members leaving the ECC are required to complete within one month of their service ending, the complainant wrote to the Secretary-General as follows: "Please find attached the handover report as well as a draft letter of recommendation. This letter can be sent to my Brussels address." The handover report thus submitted to the Secretary-General was dated 5 February 2017. However, the "draft letter of recommendation" to which the complainant referred is

not among the plethora of evidence submitted by the complainant or the ECC to the Advisory Board or the Tribunal.

The Tribunal observes, firstly, that, according to the submissions and the evidence in the file, no action was taken to follow up this request for a "draft letter of recommendation"; secondly, that on 13 January 2016 the Secretary-General had already provided a letter of recommendation that was, on the whole, complimentary of the complainant; and, lastly, that the email exchanges between the complainant and the Secretary-General that preceded the email of 6 February 2017 were cordial at the time.

3. In the second place, the Tribunal notes that subsequently, on Sunday, 23 July 2017, at 5.43 p.m., the complainant sent an email to the Secretary-General entitled "Urgent: End of service certificate" that referred to an attachment described as "20170723 Draft end of service recommendation for S. D.". In that email the complainant told the Secretary-General that he was due to start work as a professor at a "top level Chinese University" as from the beginning of September and that in order for him to receive a residence permit, the Chinese immigration authorities required a "work experience certificate" from his previous employer "including details of work, time span, contact person and official seal of the previous employer". The complainant asked the Secretary-General to have this ready by the morning of Tuesday, 25 July, at the latest.

The Tribunal observes that this email of 23 July 2017 related, according to the various expressions chosen by the complainant, either to an "end of service certificate", or an "end of service recommendation", or a "work experience certificate" and that it made no reference to the previous email of 6 February 2017. Moreover, the attachment was an "End of service recommendation for Director S. D.", to be signed by the Secretary-General and stamped by the Organisation. However, in his submissions, the complainant refers to his email of 6 February 2017 as his "first request for an end-of-service certificate". As the ECC points out in its submissions, this is not what the complainant requested at the time. In the light of the evidence, the Tribunal considers that the

complainant, on whom the onus rests to prove his assertion, does not establish that the email of 23 July 2017 was intended to follow up the previous email of 6 February.

4. In the third place, the Tribunal notes that, subsequently, on 2 August 2017, the Secretary-General sent an "end of service certificate" to the complainant in response to the email of 23 July 2017. The submissions show that the stamp of the ECC was not affixed by mistake, owing to an administrative oversight. The complainant received the certificate on 3 August but the next day he consulted a doctor, who found him to be in a "significant state of psychological distress with insomnia and anxious-depressive disorders" and noted that his state of health "could result from the harassment he alleg[ed] to have suffered from his former employer". The Tribunal notes that on 14 August the complainant sent an email to the Secretary-General with the subject line "Harassment notification", in which he stated for the first time that he felt harassed by the Secretary-General's conduct towards him. In particular, the complainant stated that on 23 July 2017 he had attached to his email a "draft for your consideration" of the "work experience certificate" he needed and that the certificate that he had received did not contain "any details of work" and so was insufficient for the Chinese immigration authorities. The complainant described the Secretary-General's conduct as "deliberate", and added "I understand that you did this to gain *effective control about all my future job search activity*" (original emphasis). He demanded that he be provided with a "mutually agreeable work experience certificate", failing which he would file an internal harassment complaint with the Advisory Board. This email of 14 August 2017 refers to an attachment, entitled "Draft Work Experience Certificate", which, however, is not present among the evidence in the files before the Advisory Board or the Tribunal.

On 18 August the Secretary-General replied to the complainant's email and formally refuted the allegations of harassment. However, he stated that he had asked his assistant to produce an additional certificate indicating the activities in which the complainant had been involved, apart from those listed in the job description already in his possession.

The second end-of-service certificate, this time signed by the Assistant Secretary-General, is dated 22 August 2017.

5. Lastly, in the fourth place, the Tribunal notes that the complainant eventually wrote to the Assistant Secretary-General on 30 January 2018 concerning the second certificate, received over five months previously. In his email, he said that he had tried to use the certificate the previous week in China to obtain the visa required for his work permit, but that the certificate did not bear the Organisation's official stamp, which had caused difficulty. He requested that this discrepancy be corrected, adding further that: "[a]s a new document needs to be established, I wish to inform you also about several other missing parts of the certificate (see 'Comments on the work service certificate [...] of 22 August 2017' [...])." A new end-of-service certificate bearing the stamp of the ECC was sent to the complainant on 2 February 2018, but on 12 February 2018 the complainant replied to the Secretary-General stating that, while the revised certificate bore the required stamp, the additions he had requested were not included. In response, in an email dated 22 February 2018, the Secretary-General expressed his surprise, since the first end-of-service certificate had been in the complainant's possession since September 2017. He added that he did not agree to incorporate the additional information, as the revised certificate bearing the official stamp had complied with his request.

6. It was following these numerous exchanges between February 2017 and February 2018 that the complainant lodged his internal harassment complaint, dated 29 March 2018, with the Advisory Board. The Tribunal observes that, beyond the circumstances described in the preceding paragraphs, concerning which the complainant alleged harassment by the Secretary-General, this was the first time since the end of his service in September 2016 that the complainant had reported harassment by the Secretary-General, which had allegedly begun in 2014, worsened in 2016 and 2017, and last occurred on 22 February 2018. The Tribunal also notes that the complainant did not lodge a formal internal harassment complaint with the Secretary-General at any stage during his employment with the Energy Charter Secretariat.

Lastly, the Tribunal notes that, while in the internal complaint the complainant requested that an end be put to the harassment "through the establishment of an end-of-service certificate" as he had demanded, his claims in the present complaint no longer include a request for the Organisation to draw up the end-of-service certificate that he had previously required. Moreover, in the light of the evidence, it appears that the revised certificate he received in February 2018 was sufficient for the Chinese immigration authorities because the complainant started work in China on 4 June 2018.

7. Staff Rule 25.2 provides for the establishment of an Advisory Board, to which the complainant referred his case. This rule states that the Board is to consist of a chairperson and four members, two of whom are appointed by the Secretary-General and two by the staff representatives. Rules 25.3 and 25.4 deal with the Board's procedure and recommendations, and possible appeals to the Tribunal following these recommendations. Rule 25.3(c) provides, inter alia, that the final decision in the matter is to be taken by the Secretary-General within 60 days of the Board transmitting its report to her or him.

Furthermore, concerning harassment within the ECC, Staff Regulation 25-bis, entitled "Harassment Claims", provides that:

> "a) Any official shall not conduct any harassment.
>
> b) i) Harassment is defined as any deliberate conduct, in the workplace or in connection with the work of the Secretariat, which is reasonably perceived as offensive or unwelcome by the subject person and has the purpose or effect of: an affront to the identity, dignity, personality or integrity of the subject person; or the creation of an intimidating, hostile, humiliating or offensive work environment.
>
> ii) Harassment may take the form of sexual harassment but is not limited to it. [...]
>
> c) When an official believes that he or she is exposed to harassment, he or she shall clearly communicate it, directly or through a third party, to the other party (i.e. the alleged harasser).
>
> d) When the alleged harassment continues after the communication described in paragraph c), the official who believes that he or she is exposed to harassment may refer the matter to any of the following proceedings:

i) an informal counselling;

ii) mediation; or

iii) a complaint to the Advisory Board.

It is not required, but strongly recommended, that an official refers to at least one of the proceedings mentioned in subparagraphs (i) and (ii) before submitting a complaint to the Advisory Board.

e) Any referral to proceedings listed in paragraph d) shall be made within six months of the occurrence of the alleged harassment. If the subject matter is a series of actions, these six months shall start from the occurrence of the latest action.

f) Any official shall act in good faith when referring the matter of alleged harassment to any of the proceedings listed in paragraph d). Any proven false or malicious accusation of harassment may be subject to disciplinary measures."

It should be added to the above that, according to the list of formalities to be completed at the time of termination of service, officials are entitled to receive from the organisation, via Administration and Finance (AF), "any certificates, which may be required confirming employment with the Secretariat" and "any reference letters, which may be required (to be supplied by immediate superior through AF)". However, the exact content of these "certificates" or "reference letters" is not specified in the relevant texts.

8. Against this background, the complainant puts forward three pleas in support of his claim for the setting aside of the impugned decision of the Secretary-General of 11 June 2018. These pleas allege a misconstruction of the concept of harassment, blatant errors of assessment and a breach of the duty to provide reasons for a decision, and a breach of the principle of sound administration and the duty of care towards officials.

9. Regarding the first plea of a misconstruction of the concept of harassment, the complainant submits that the Advisory Board committed an error of law in its assessment of the alleged harassment in considering that harassment only existed if it was intentional. In his view, this renders the findings of the Advisory Board and the subsequent decision of the Secretary-General unlawful.

In Judgment 4167, consideration 7, the Tribunal stated the following concerning the applicable provision in another organisation that made the existence of harassment contingent on the alleged harasser's intention to commit harassment:

> "At the material time, paragraph 3 of [...] Article 12a [of the Staff Regulations] read as follows:
>
> '"Psychological harassment"' means any improper conduct that takes place over a period, is repetitive or systematic and involves physical behaviour, spoken or written language, gestures or other acts that are intentional and that may undermine the personality, dignity or physical or psychological integrity of any person.'
>
> The complainant relies on the case law of the courts of the European Union, in particular the judgment of the European Union Civil Service Tribunal of 9 March 2010 in Case F-26/09, which applied an article of the Staff Regulations of Officials of the European Union drafted in exactly the same way. According to that judgment:
>
> 'Article 12a(3) of the Staff Regulations defines psychological harassment as '"improper conduct"' which requires, in order to be established, that two cumulative conditions be satisfied. The first condition relates to the existence of physical behaviour, spoken or written language, gestures or other acts which take place '"over a period"', and are '"repetitive or systematic"', which suggests that psychological harassment must be a process that occurs over time and presumes the existence of repetitive or continual conduct, which is '"intentional"'. The second cumulative condition, which is joined to the first by the conjunction '"and"', requires that such physical behaviour, spoken or written language, gestures or other acts have the effect of undermining the personality, dignity or physical or psychological integrity of any person. By virtue of the fact that the adjective '"intentional"' applies to the first condition, and not to the second, it is possible to draw a twofold conclusion. First, the physical behaviour, spoken or written language, gestures or other acts referred to by Article 12a(3) of the Staff Regulations must be intentional in character, which excludes from the scope of that provision improper conduct which arises accidentally. Secondly, it is not, on the other hand, a requirement to prove that such physical behaviour, spoken or written language, gestures or other acts were committed with the intention of undermining the personality, dignity or physical or psychological integrity of a person. In other words, there can be psychological harassment within the meaning of Article 12a(3) of the Staff Regulations without the need to demonstrate that there has been any intention on the part of the harasser, by his conduct, to discredit the victim or deliberately impair the latter's working conditions. It is sufficient that such improper conduct, provided that it was committed intentionally, led objectively to such consequences. [...]'

> This Tribunal is obviously not bound by the case law of the courts of the European Union. However, in the present case, it interprets Article 12a(3) of the Staff Regulations in the same way, bearing in mind that this interpretation is in line with its general case law on the subject, according to which harassment and mobbing do not require any malicious intent (see Judgments 2524, consideration 25, 3400, consideration 7, and 4085, consideration 15)." (Emphasis added.)

The Tribunal reiterated that intent is not a necessary element of harassment in Judgment 3250, consideration 9.

10. In the unanimous opinion endorsed by the Secretary-General in the impugned decision, the Advisory Board referred to the definition of harassment provided in Staff Rule 25-bis cited above. The Board found that this definition refers to "deliberate conduct" which is "reasonably perceived as offensive or unwelcome by the subject person". The Board stated that it had to decide whether the alleged harassment should be recognised and, if so, whether that harassment was deliberate.

The Tribunal notes that in its report, the Advisory Board examined whether the physical behaviour, spoken or written language, gestures or other acts were established and, having determined that they were, sought to ascertain whether deliberate inappropriate conduct was involved. By so doing, the Board simply complied with the definition of harassment in Staff Rule 25-bis b)i), without inquiring into whether there had been any malicious intent on the part of the Secretary-General, which, as is clear from the case law cited in consideration 9, above, is a different matter.

It follows that the Board, which, contrary to what the complainant argues, did not consider that the recognition of harassment presupposed malicious intent, did not err in law and that the impugned decision is lawful in this respect.

The Tribunal also notes that, in accordance with the requirements of its case law, as recalled, for example, in Judgment 3577, consideration 10, the organisation dealt with the complainant's allegations of harassment in a timely and efficient manner. The Advisory Board received the internal complaint on 18 April 2018 and delivered its report on 8 June 2018. In addition, the Board met five times and at one of its meetings,

on 18 May 2018, heard the complainant and his lawyer, as well as the Secretary-General.

On this point, the Tribunal also notes that, in its assessment, the Advisory Board reviewed each of the 85 facts raised by the complainant in his submissions. Regarding the facts relating to the content of the end-of-service certificate, the Board noted that the certificate sent to the complainant on 22 August 2017 fulfilled the request made and that the Secretary-General's refusal to add the additional information requested by the complainant on 12 February 2018, more than five months after receipt of the certificate of 22 August 2017, which had already revised an earlier certificate of 2 August 2017, did not warrant the allegation of harassment. In that respect, the Advisory Board found that the additions requested by the complainant were either already covered by the end-of-service certificate issued or related to facts that were not clear enough to justify their inclusion. For each fact examined, the Board concluded that there were no grounds for the allegation of harassment.

Concerning harassment in the process of obtaining the end-of-service certificate, the Advisory Board responded to the complainant's allegations that these were "deliberate acts directed personally against him with the intention of harming him". To that end, the Board conducted an assessment of the facts before finding that the Secretary-General had acted in good faith throughout the process and that the complainant had only reacted to the content of the certificate several months after receiving it.

As regards the complainant's other points, which related to alleged harassment raised for the first time in his internal complaint of 29 March 2018, lodged more than 18 months after he had left the ECC, the Advisory Board analysed them in detail before concluding, in each case and in a manner that the Tribunal finds convincing, that these did not constitute harassment.

11. In the Tribunal's view, the Advisory Board thus performed, in line with the Tribunal's settled case law on harassment (see, for example, Judgment 4241, consideration 9), "a careful examination of all the objective circumstances surrounding the acts complained of" and

an analysis of what could reasonably and objectively be perceived by the complainant as degrading or humiliating. The fact that the Board noted that the complainant had raised several incidents long after they occurred, without having previously reported them while he was employed, does not render its report or the impugned decision unlawful, particularly because this circumstance was completely relevant.

The complainant's first plea is therefore unfounded.

12. Concerning the complainant's second plea that the Advisory Board committed blatant errors of assessment, the Tribunal finds that none of the errors he alleges are apparent from the file.

In the present case, in his submissions the complainant essentially asks the Tribunal to repeat the Advisory Board's analysis and to substitute its own assessment of the facts for that of the Board. This misconstrues the role of the Tribunal, which, in Judgment 4344, consideration 8, pointed out:

> "[...] that it is not its role to reweigh the evidence before an investigative body which, as the primary trier of facts, has had the benefit of actually seeing and hearing the persons involved, and of assessing the reliability of what they have said. For that reason, such a body is entitled to considerable deference."

That case law is fully applicable in the present case.

As to the failure to provide reasons alleged by the complainant in his second plea, the Tribunal considers, in the light of the evidence, that he received sufficient information to enable him to understand the reasons why his harassment complaint was dismissed (see, to this effect, Judgment 4228, consideration 6).

The second plea is likewise unfounded.

13. With regard to the complainant's third and final plea that the ECC breached the principle of sound administration and its duty of care towards him, the complainant refers to all the facts that support his first two pleas. However, since those pleas are unfounded, the same conclusion must be drawn for the third plea. In particular, a breach of the Organisation's duty of care has not been established.

14. As the complainant's pleas concerning the alleged harassment are unfounded, the claim for compensation for injury must be dismissed.

15. In the light of the foregoing, the complainant's claims must be dismissed in their entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 May 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ